(3)

No. 86-1576

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES E. WOLFE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the IRS can collect a corporation's tax liability by levying against property held in the name of its sole shareholder, but imputed to the corporation under the "alter ego" doctrine, without making a separate assessment against the shareholder.

2. Whether petitioner's corporation was his "alter ego" under Montana law, thereby making his assets available to satisfy the corporation's tax liabilities.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABEL OF AUTHORITIES

Cases:

E.C.A. Environmental Management v. *Toenyes*, 679 P.2d 213 (Mont. 1984) 6

Flemmer v. *Ming*, 621 P.2d 1038 (Mont. 1980) 6

G.M. Leasing Corp. v. *United States*, 429 U.S. 338 (1977) 4

Stromberg v. *Seaton Ranch Co.*, 160 Mont. 293, 502 P.2d 41 (1972) 6

United States v. *National Bank of Commerce*, 472 U.S. 713 (1985) 4

Statute and regulation:

Internal Revenue Code (26 U.S.C.):

§ 6331(a) 3

§ 6332 3

Treas. Reg. § 301.6331-1(a)(1) 3

Miscellaneous:

Comment, *Piercing the Corporate Veil in Montana*, 44 Mont. L. Rev. 92 (1983) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-24) is reported at 798 F.2d 1241. The order of the court of appeals on rehearing amending its original opinion (Pet. App. 24-26) is not reported. The opinion of the district court is reported at 612 F. Supp. 605 (Pet. Supp. App. 1-5).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1986. A petition for rehearing was denied on December 29, 1986 (Pet. App. 24-26). The petition for a writ of certiorari was filed on March 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The parties stipulated to the facts and exhibits in this case. Petitioner was the sole shareholder and president of Wolfe & Co., Inc. ("the corporation"), which leased tractor-trailers. Petitioner also operated as a sole proprietorship an

"over-the-road" trucking business known as Evergreen Express ("the proprietorship"). Petitioner did not maintain a separate bank account for the corporation. He deposited all revenues generated by the corporation into his own bank account. However, he charged the corporation not only with wages and employment taxes generated by the corporation, but also with wages and employment taxes generated by the proprietorship. Pet. App. 19.

During 1974-1976, the corporation accumulated a sizable federal tax liability for employment, diesel fuel, and highway use taxes. As of January 27, 1977, the outstanding amount of unpaid taxes was $80,712.38, including penalties, fees and interest. This amount was assessed against the corporation, but, after notice and demand, it failed to pay the outstanding liability. The IRS then levied on ICC permits used in petitioner's unincorporated trucking business by issuing a levy on that property and by serving notices of levy upon the ICC and two prospective buyers of the permits. Petitioner ultimately satisfied the corporation's outstanding tax liability, which at the time had increased to $114,472.91, and obtained a release of the levy on the ICC permits. Pet. App. 19.

2. Petitioner thereafter brought this refund suit in the United States District Court for the District of Montana, alleging that the levy was invalid because he was not personally liable for the corporation's taxes and because no assessment had been made against him. The district court granted the government's motion for summary judgment (Pet. Supp. App. 1-5). The court concluded that the government could satisfy the corporation's outstanding federal tax liability from petitioner's assets by using the "alter ego" doctrine to pierce the corporate veil of his corporation (*id.* at 2-3). The court also rejected petitioner's reliance on the fact that the government had not made a separate assessment of the corporation's tax liability

against him personally. It explained that the alter ego theory for piercing the corporate veil is "not a tax theory but rather a theory available to any creditor, and a separate assessment of tax is not required" (*id.* at 4).

The court of appeals unanimously affirmed (Pet. App. 18-24). Noting that the "government stands in a position analogous to any creditor seeking to collect debts owed by the corporation" (*id.* at 21), the court held that the alter ego doctrine could be invoked in an appropriate case to make a shareholder liable for his corporation's taxes (*id.* at 19-21). On these facts, the court concluded that it was correct to treat petitioner as the alter ego of his corporation under Montana law (*id.* at 21-22). The court also rejected petitioner's argument that a levy can be made against property in the possession of a third party only if that party has been assessed for the taxes owed by the taxpayer, stating that "levies can be effected against any person in possession of the taxpayer's property" (*id.* at 23).

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the levy against his property was invalid because the unpaid taxes were not assessed against him personally. This contention is without merit.

The Internal Revenue Code provides that when a taxpayer against whom an assessment is made fails to make payment after notice and demand, the government may collect such tax by levy upon the taxpayer's property. 26 U.S.C. 6331(a). "[A]ny person in possession of * * * property subject to levy" is required to turn over that property to the IRS upon request. 26 U.S.C. 6332. As a procedural matter, that request is "made by serving a notice of levy on any person in possession of * * * property subject to levy." Treas. Reg. § 301.6331-1(a)(1). Thus, it is established beyond doubt that a levy may be made against a taxpayer's

property in the hands of a third party, even if no assessment was ever made against the third party.

This is the procedure that was followed here. After the corporation failed to pay its taxes following assessment, notice, and demand, the IRS sought to collect those taxes by levy against its property (ICC permits that were regarded as its property under an alter ego theory) in the hands of a third party.[1] This was accomplished by directing a levy to petitioner, who held the permits, and by serving protective notices of levy upon the ICC and upon the trucking companies that were prospective purchasers of the permits.

Petitioner's objection to this procedure is somewhat obscure. Certainly, there is nothing in *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), that calls this procedure into question (cf. Pet. 14-15). To the contrary, that case explains that the service of a notice of levy upon a third party gives the government "the right to all property levied upon * * * and creates a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government" (472 U.S. at 720), even though an assessment has not been made against the third party. *National Bank of Commerce* provides no support for petitioner's confusing effort to draw a distinction between a "levy" and a "notice of levy" (see Pet. 14-15); as the court of appeals explained (Pet. App. 23), "a notice of levy is simply a means of effecting a levy against persons in possession of taxpayer property." And the fact that the government

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[1]When property is correctly regarded as the taxpayer's property under an alter ego theory, there is no doubt that the government may levy upon that property to satisfy the taxpayer's outstanding tax liabilities just as if the property were held in the taxpayer's name. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-351 (1977).

sought to satisfy the corporation's tax liabilities by resorting to petitioner's assets under an alter ego theory did not give rise to a distinct requirement that an assessment be made against petitioner. As the district court explained (Pet. Supp. App. 4), the government was simply seeking to collect its debt like any other creditor; it was not finding that petitioner as an individual owed any tax, and therefore its collection activity did not give rise to any requirement that a new assessment be made.

2. The underlying basis for all of petitioner's objections here appears to be his contention (Pet. 15-16) that the courts below erred in holding that the "alter ego" doctrine justified the levy on the ICC permits to satisfy the corporation's tax liability. If the permits could not be regarded as the corporation's property, then the government could not levy against the permits in satisfaction of the corporation's tax. The courts below concluded, however, that, under Montana law, the "alter ego" doctrine was applicable here and permitted the government as creditor to satisfy the corporation's tax debt by resorting to assets held in petitioner's name. This determination was correct and, moreover, represents a construction of state law that in any event would not warrant review by this Court.[2]

The district court carefully analyzed the factors underlying the "alter ego" doctrine in Montana and concluded that "the instant case present[s] the classic case of a shareholder so pervasively dominating corporate affairs that the shareholder and the corporation no longer have separate identities" (Pet. Supp. App. 3). The court emphasized that petitioner was the sole shareholder as well as director and

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[2]As the court of appeals stated on rehearing (Pet. App. 25), the federal courts have sometimes resorted to federal common law in making an "alter ego" determination, depending on "the degree to which the subject matter of the case implicates federal interests." In this case, petitioner has never disputed the lower courts' application of Montana law to resolve the alter ego question (*ibid.*).

president of the corporation, that the corporation had no bank account of its own, that all banking transactions were carried out through the proprietorship, that the wages of the corporation's employees were paid by the proprietorship, that all purchases on behalf of the corporation were paid for by the proprietorship, and that all third-party payments to the corporation were deposited into the proprietorship's bank account (*ibid.*). In these circumstances, the court of appeals was plainly correct in finding that the evidence "was overwhelmingly sufficient to support the finding by the district court that [petitioner] was the alter ego of his corporation" (Pet. App. 23).[3] See generally *E.C.A. Environmental Management* v. *Toenyes*, 679 P.2d 213, 218-219 (Mont. 1984); *Flemmer* v. *Ming*, 621 P.2d 1038 (Mont. 1980); *Stromberg* v. *Seaton Ranch Co.*, 160 Mont. 293, 502 P.2d 41 (1972); Comment, *Piercing the Corporate Veil in Montana*, 44 Mont. L. Rev. 92 (1983).

Petitioner's contention (Pet. 15-16) that an alter ego finding could justify resort to the corporation's assets to satisfy the individual's liability, but not resort to the individual's assets to satisfy the corporation's liability, is wholly without merit. The conclusion that the corporation was an "alter ego" of petitioner was a finding that "the corporation and the proprietorship were operated as a single instrumentality under the sole control of [petitioner]" (Pet. Supp. App. 3). It logically follows from the inseparability of petitioner and his corporation that the assets of one should be available to satisfy the liabilities of the other, and petitioner cites no authority suggesting a contrary conclusion.

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[3]Given the strength of the undisputed evidence supporting the alter ego finding, the court of appeals expressly did not consider admissions made in petitioner's deposition that the corporate form was a "screen" and that it was impossible to separate the business that he operated in corporate form from the business that he operated as a sole proprietorship. See Pet. App. 22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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